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No. 07-1429

Supreme Court, U.S.
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In The

Supreme Court of the United States

JIMMIE URBANO LUCERO,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Sixth Amendment prohibits exposing juries to outside influences during deliberations. Such influences include bribery, information from third parties about the facts of the case, or other communications that have factual relevance to the issues before the jury. Courts must conduct a case-by-case examination to determine if an outside influence gives rise to a presumption of prejudice. Lucero's jury foreman began their hours of penalty-phase deliberation by reading, from his personal Bible, a quote instructing them to follow man's law. The trial court, in denying Lucero's motion for a new trial, found that he failed to show any harm. The state's highest court affirmed. Lucero now seeks certiorari review of that decision on a variety of grounds.

1. Is a Bible passage which duplicates the trial court's instructions considered an external influence on the jury that is presumed to be prejudicial?
2. If prejudice is presumed, was there sufficient evidence before the trial court to support its conclusion that the passage had no effect on the verdict?
3. Did the court below properly apply state law in denying a hearing on Lucero's motion for new trial?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner Jimmie Urbano Lucero (Lucero) was properly convicted and sentenced to die for the capital murder of his neighbors Maria Fabiana Robledo, Maria Manuela Robledo, and Pedro Robledo. In the instant petition for certiorari review, Lucero complains that his death sentence is void because the jurors read the Bible during punishment deliberations. As demonstrated below, the relevant passage they read resembles neither jury tampering by a third party, nor extraneous facts relevant to the case itself, and therefore is not an external influence that would support a presumption of prejudice. Further, any such presumption would be defeated by the ample evidence indicating there was no harm. Therefore, certiorari review should be denied.

STATEMENT OF THE CASE

I. Facts of the Crime

> On the morning of September 6, 2003 . . . 45-year-old [Lucero] entered his neighbor's property and murdered three members of the Robledo family with a shotgun. Pedro Robledo, his wife, Manuela Robledo, and their daughter Fabiana Robledo were murdered. [Lucero] also attempted to murder the Robledo's other two children, Socorro and Guadalupe Robledo, who both testified at trial. Socorro testified that he escaped on foot without injury, and Guadalupe testified that [Lucero] cornered her, Fabiana, and Fabiana's 18-month old son in a bedroom. [Lucero] shot Guadalupe in the arm and murdered Fabiana after

pulling her son from her arms.

Lucero v. State, 246 S.W.3d 86, 88 n.1 (Tex. Crim. App. 2008). On May 23, 2005, Lucero was convicted of capital murder.[1] CR 215. Pursuant to the jury's answers to two statutory special issues, the trial judge sentenced him to death on May 26, 2005. CR 214-216.[2]

II. Facts on Punishment

The State presented evidence that Lucero had assaulted and threatened various family members, girlfriends, other people, and pets; unlawfully carried a weapon; drove while intoxicated and burglarized a home. 17 RR 7-46, 138-39, 145-47, 163-65; 18 RR 86-89, 102-03, 125-34, 140-41, 145-46, 178-80; SX 178.[3] The State also presented testimony by the chief investigator for the Special Prosecution Unit, regarding the prevalence and violence of crimes within the prison system. 17 RR 80-135.

Lucero presented evidence that he was a favorite uncle to his siblings' children, and that he had been baptized at a local church. 17 RR 67-68; 18 RR 106-07; 19 RR 217-18; 20 RR 12. He was one of ten children abandoned by his father at a young age, and dropped out of school in the eleventh grade. 19 RR 28-29. Lucero's father was mentally ill and spent time in institutions. 20 RR 8-10. Lucero's mother and sisters testified that he

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[1] Tex. Penal Code Ann. § 19.03(a)(7) (West 2006).

[2] Tex. Code Crim. Proc. art. 37.071, §§ 2(b) & (e)(West 2006).

[3] "RR" stands for the Reporter's Record of proceedings during the trial, preceded by volume number and followed by page number(s); "SX" denotes the State's Exhibits admitted into evidence.

lived next door to his mother, checked on her frequently, took her grocery shopping and to the doctor's office, and took care of her home and yard for her. 19 RR 157-159, 224, 232; 20 RR 6-7. Additionally, Lucero presented testimony to the effect that the victims were rude to Lucero's elderly mother by cursing, having loud parties, and urinating in their backyard. 18 RR 59-60, 80-82; 19 RR 163-68; 20 RR 16-18, 34-37.

Dr. Steven Schneider, a forensic psychologist, testified that Lucero became tearful and would not discuss the crime with him. 19 RR 31. He also opined that Lucero was mildly to moderately neurologically and cognitively impaired, has an IQ of 73, was less able to consider the consequences of his actions, and had issues that could be addressed with medication. 19 RR 34, 36-37, 46. Lucero also presented testimony that he tried to commit suicide while awaiting trial. 19 RR 188-93.

III. Relevant Facts Regarding the Jury's Punishment Deliberations

The record establishes that the jury foreman read Romans 13:1-6, from the New International Version of the Bible, to the jury early on during punishment-phase deliberations. This took approximately two minutes, several hours before the verdict was rendered. CR 375; *see also* 275-278; 293-297; 300-328. Those verses provide:

> 1 Everyone must submit himself to the governing authorities, for there is no authority except that which God has established. The authorities that exist have been established by God.
>
> 2 Consequently, he who rebels against the authority is rebelling against what God has

> instituted, and those who do so will bring judgment on themselves.
>
> 3 For rulers hold no terror for those who do right, but for those who do wrong. Do you want to be free from fear of the one in authority? Then do what is right and he will commend you.
>
> 4 For he is God's servant to do you good. But if you do wrong, be afraid, for he does not bear the sword for nothing. He is God's servant, an agent of wrath to bring punishment on the wrongdoer.
>
> 5 Therefore, it is necessary to submit to the authorities, not only because of possible punishment but also because of conscience.
>
> 6 This is also why you pay taxes, for the authorities are God's servants, who give their full time to governing.

Lucero v. State, 246 S.W.3d at 89 n. 4.

After the trial, Lucero filed new trial motion raising a claim of jury misconduct. CR 220-223.[4] He attached to his motion an affidavit from a juror that provided:

> I served as a juror in the case styled *The State of Texas v. Jimmie Urban* [Urbano] *Lucero* in the 251st District Court in Potter County, Texas. During jury deliberations at

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[4] "CR" stands for the Clerk's Record of papers filed regarding this case, followed by page number(s).

> the punishment phase of the trial, I recall that the jury foreman suggested that we take a "straw vote" or a preliminary vote on the two special issues to see where we, as the jury were. The initial vote on both special issues showed 10 jurors were in favor of answering the questions in a way in which the death penalty would be imposed. The remaining two jurors were unwilling to answer those questions in a way in which the death penalty would be imposed. It was a[t] this point in time that the jury foreman took out a Bible which he had with him. He read some scripture from the Bible. This scripture had to do with a Christian's duty to obey, conform and consent to the will and laws of man. This reading of scripture occurred before the final votes were taken by the jury on the two special issues regarding the probability that the Defendant would commit criminal acts of violence in the future and the sufficiency of mitigating evidence which would justify a life sentence in place of the death penalty. Although there was not a unanimous vote by the jury as a whole on the two special issues before the reading of the scripture, the vote was unanimous on both special issues some time after the reading of scripture. The foreman of the jury then informed the bailiff and the Court that we had reached a unanimous verdict which called for the death penalty against Jimmie Lucero.

CR 220-223. Lucero further claimed that the trial court must hold a hearing on his new trial motions so that he

could develop the circumstances of the Bible reading. CR 237-43.

Texas Rule of Evidence 606(b) generally prohibits a juror from testifying about jury deliberations for the purpose of impeaching the jury's verdict, but it includes an exception that a juror may testify "whether any outside influence was improperly brought to bear upon any juror."[5] Relying primarily on civil cases, the State replied that the Bible reading was not an "outside influence" and that appellant was, therefore, improperly attempting to impeach the jury's verdict under Rule 606(b). CR 254.[6]

The juror whose affidavit was submitted by Lucero

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[5] Rule 606(b) provides: Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the jury's deliberations, or to the effect of anything on any juror's mind or emotions or mental processes, as influencing any juror's assent to or dissent from the verdict or indictment. Nor may a juror's affidavit or any statement by a juror concerning any matter about which the juror would be precluded from testifying be admitted in evidence for any of these purposes. However, a juror may testify: (1) whether any outside influence was improperly brought to bear upon any juror; or (2) to rebut a claim that the juror was not qualified to serve.

[6] Citing *Golden Eagle Archery Inc. v. Jackson*, 24 S.W.3d 362, 366-75 (Tex.2000)(rules contemplate that an "outside influence" originates from sources other than the jurors themselves); *Brandt v. Surber*, 194 S.W.3d 108, 134 (Tex.App.-Corpus Christi 2006, pet. denied) (a jury's discussion of newspaper articles is not an "outside influence"); *Easly v. State*, 163 S.W.3d 839, 842 (Tex.App.-Dallas 2005, no pet.) (a chart brought into jury room with calculations of time appellant would serve in prison after application of the parole laws is not an "outside influence"); *Perry v. Safeco Ins. Co.*, 821 S.W.2d 279, 281 (Tex.App.-Houston [1st Dist.] 1991, writ denied) (juror using dictionary to share a definition with other jurors is not an "outside influence").

gave a subsequent affidavit stating there was no connection between the Bible reading and the death-penalty votes. CR 293-297. All twelve jurors signed affidavits concerning the reading of the Bible during the punishment deliberations. CR 275-278; 293-297; 300-328. Eleven jurors agree that nothing was read suggesting that a murderer should be executed under Biblical law. The last juror does not recall what Scripture was read. CR 325. The two jurors who changed their votes after the preliminary vote state that the reading of the scripture and its content had no effect on their votes on the issues presented to the jury. CR 300-304, 306-308.

The trial court responded to Lucero's motion for new trial by requesting additional briefing, noting

> A motion for new trial supported only by inadmissible statements does not raise a matter upon which an appellant could be entitled to relief. . . Affidavit testimony to support a motion for new trial states reasonable grounds only if the matter discussed in the affidavit would be admissible in a subsequent hearing on the motion.

CR 231 (citing *Dunkins v. State*, 838 S.W.2d 898 (Tex.App.- Texarkana 1992, pet. ref'd.). After considering both parties' briefs, the trial court denied the hearing and motion for new trial and stated:

> While I recognize that "sometimes trial courts choose to wisely make a full record of factual matters in death penalty cases", I believe that such action is contrary to the public policy being promoted by Rule 606(b)

> of the Texas Rules of Evidence, in that it would subject the jurors to the rigors of direct and cross examination regarding their deliberations. Such public scrutiny of confidential deliberations would discourage open discussion among jurors and could potentially be threatening to the entire jury process.
>
> To conduct a hearing simply to make a record, without any expectation that the hearing would result in admissible evidence, does not protect jurors from the inconvenience and potential harassment that such a hearing would impose. Therefore, under the present circumstances, I do not believe that [Lucero] has raised an issue which would require an evidentiary hearing.

CR 350-51.

IV. Disposition in Court Below

Direct appeal to the Texas Court of Criminal Appeals is automatic.[7] After reviewing his seven points of error, the lower court affirmed the trial court's denial of a hearing and the jury's judgment and sentence of death. *Lucero v. State,* 246 S.W.3d at 88. Specifically, the lower court found that the record presented no reasonable grounds for relief. It further held that Lucero's request for an evidentiary hearing on his motion for new trial was appropriately denied, because the record showed that the scripture reading was brief and merely admonished jurors to follow "man's law," that the

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[7] Tex. Code Crim. Proc. art. 37.071, § 2(h).

quotation duplicated that which was in trial court's instructions, and juror affidavits clearly indicated that scripture had no effect on the verdict, which was rendered some hours later. *Id.* at 89. This petition follows.

REASONS FOR DENYING THE WRIT

I. The Jurors' Consultation of the Bible in the Jury Room Did Not Constitute an External Influence That Raises a Presumption of Prejudice Under the Sixth Amendment.

This Court has held that a defendant's Sixth Amendment right to an impartial jury is violated when the jury is exposed to outside influences during its deliberations. *Parker v. Gladden,* 385 U.S. 363, 364-65 (1966) (citing *Turner v. Louisiana,* 379 U.S. 466, 472-73 (1965)). Such outside influences trigger a rebuttable presumption of prejudice. *Remmer v. United States,* 347 U.S. 227, 229 (1954). Although this Court has not precisely defined "outside influence," it has offered some guidance. For example, information about the case from a newspaper account or a third person that was not introduced as evidence during trial is an external influence. *Tanner v. United States,* 483 U.S. 107, 117 (1987) (citing *Mattox v. United States,* 146 U.S. 140, 149-50 (1892); *Parker,* 385 U.S. at 365; and *Remmer,* 347 U.S. at 228-30). On the other hand, improper communications between jurors themselves, or irregularities within the jury room, are internal. *Id.* (citing *McDonald v. Pless,* 238 U.S. 264, 267 (1915); and *Hyde v. United States,* 225 U.S. 347, 384 (1912)); *see also id.* at 125 (categorizing juror intoxication or sleeping as internal).

Whether an influence is "external" or "internal" depends on the facts of each case, but at its core the distinction amounts to an examination of the "nature of

the allegation" of an improper influence on the jury. *Tanner*, 483 U.S. at 117; *see Oliver v. Quarterman*, --- F.3d ----, 2008 WL 3522425, (5th Cir. August 14, 2008); *Robinson v. Polk*, 438 F.3d 350, 363 (4th Cir. 2006) ("Under clearly established Supreme Court case law, an influence is not an internal one if it (1) is extraneous prejudicial information; *i.e.*, information that was not admitted into evidence but nevertheless bears on a fact at issue in the case, or (2) is an outside influence upon the partiality of the jury, such as 'private communication, contact, or tampering with a juror.'") (internal citations omitted). Judge King, in his dissent from the denial of en banc rehearing in *Robinson*, cogently synthesized these Supreme Court cases:

> The external influences recognized by the Court in those decisions are factually diverse, but they share a single, constitutionally significant characteristic: they are external to the evidence and law in the case, and carry the potential to bias the jury against the defendant. This legal principle unifies the bailiff's remarks disparaging the defendant in *Parker*, the relationship of confidence between the jury and key prosecution witnesses in *Turner*, and the effort to bribe a juror in *Remmer*.

Robinson v. Polk, 444 F.3d 225, 231 (4th Cir. 2006) (King, J., dissenting).

This Court's rationale in this area is logical and clear. For example, the Fifth Circuit recently found that a Bible passage from Numbers

> . . . does not generally inform a juror's moral understanding of the world. The jurors did

> not testify that they knew, as people of faith, that someone who hits another over the head with an "instrument of iron" or a "hand weapon of wood" so that the person dies is a murderer and should be put to death. Instead, several jurors testified that they read this passage in the Bible while they were in the jury room debating Oliver's fate. Thus, the jury's use of the Bible here amounts to a type of "private communication, contact, or tampering" that is outside the evidence and law, which is exactly what *Remmer* sought to circumscribe.

Oliver, 2008 WL 3522425 at *17 (citing *Remmer*, 347 U.S. at 229). However, the passage Lucero complains of is not analogous to the Biblical instruction that certain murders should be punished by death, as in *Oliver*, nor a third party's attempt to bribe a juror, as in *Remmer*. Nor is it similar to the undue influence resulting from contact with law-enforcement officials described in *Parker* and *Turner*. Indeed, *Remmer* and its progeny turn on the fact that the external influences in question had *evidentiary relevance* to the trial itself. *See Turner*, 379 U.S. at 472-73 ("the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel").

In this case, however, the Bible had no *evidentiary* relationship to the jury's punishment deliberations.[8] The

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[8] The only fact issues before the jury were "whether there is a probability that [Lucero] would commit criminal acts of violence that would constitute a continuing threat to society" and "whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and

Biblical passage from Romans in this case bears no relationship to the factual issues facing the jury. *See, e.g., Keeton v. State,* 724 S.W.2d 58 (Tex. Crim. App. 1987) (discussing factors to be considered by a jury in assessing future dangerousness). The passage involved confirms only the appropriateness of the jury following the court's instructions. That is not a factual issue at all; it duplicates the trial court's own charge authorizing the jury to make this moral judgment. *Lucero v. State,* 246 S.W.3d at 95.

This is the approach taken in sister circuits as well. For example, the Ninth Circuit has also assumed that a jury's reference to biblical verses during punishment deliberations is dissimilar to the types of misconduct addressed in *Remmer, Parker,* and *Turner. Fields v. Brown,* 503 F3d 755, 780-81(9th Cir. 2007). Instead, they merely reflect "notions of general currency that inform the moral judgment that capital-case jurors are called upon to make." *Id.* at 780. "The type of after-acquired information that potentially taints a jury verdict should be carefully distinguished from the general knowledge, opinions, feelings and bias that every juror carries into the jury room." *Id.* (quoting *McDowell v. Calderon,* 107 F.3d 1351, 1367 (9th Cir. 1997)) (quotation in *McDowell* omitted). Likewise, the Fourth Circuit has noted that a juror's consultation of the Bible during sentencing proceedings is not an external influence under *Remmer. Billings v. Polk,* 441 F.3d 238, 248 (4th Cir. 2006). The court expressed doubt that the juror's actions constituted a "private communication, contact, or tampering" within the meaning of *Remmer,* "which used

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background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed." Tex. Code Crim. Proc. art. 37.071, §§ 2(b)(1) & e(1).

those terms in the context of a case where a juror was offered a bribe and was subsequently investigated by an FBI agent during the trial." *Billings,* 441 F.3d at 248.

In the Sixth, Seventh, and Eighth Circuits, application of the *Remmer* presumption turns on the same case- and fact-specific discrimination between external and internal influences. *See, e.g., United States v. Gallardo,* 497 F.3d 727, 735-36 (7th Cir. 2007); *Garcia v. Andrews,* 488 F.3d. 370, 374-77 (6th Cir. 2007); *Garcia v. Bertsch,* 470 F.3d 748, 755-56 (8th Cir. 2006). Moreover, if there was error, it was trial error, not structural, and therefore is subject to harmless-error analysis under *Chapman.*[9]

Lucero contends there is a circuit split on the propriety of juries reading the Bible during their deliberations. Petition at 12-13. Procedurally speaking this case is not the best vehicle with which to address such a split, since the authorities to which Lucero refers are collateral attacks in the appeals circuit courts, not direct appeals in the states' highest courts. Lucero's strongest argument that there is a circuit split rests on the Eleventh Circuit opinion in *McNair v. Campbell,* finding a similar Biblical passage to be extraneous evidence creating a presumption of prejudice. Petition at 19; *McNair,* 416 F.3d 1291, 1309 (11th Cir. 2005). However, on facts much like these, habeas relief was properly denied because the State easily rebutted the presumption of prejudice. *Id.* As in Lucero's case, nothing judgmental or prejudicial was read. *Id.* As here, the passages and prayers merely had the "effect of encouraging the jurors to take their obligations seriously

[9] ". . . [B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California,* 386 U.S. 18, 24 (1967).

and to decide the question of guilt or innocence based only on the evidence." *Id.*

In addition to the innocuous nature of the Bible passages and the fact that they did not distract the jury from basing its verdict on the evidence presented, two other factors indicated in *McNair* also strongly favor the State in the instant case. The Bible in both cases was brought in by a juror without the imprimatur of the court. *Id.* Additionally, the State offered overwhelming and largely uncontested evidence of guilt and future dangerousness, while the defense offered a fairly weak mitigation case.[10] Even if a presumption of prejudice were appropriate, the State overcame it. These factors establish both that Lucero failed to make the showing necessary to merit an evidentiary hearing, and that the jury's exposure to the passage in Romans was harmless. *Id.*

Many of the cases Lucero refers to actually find Biblical reference during deliberation to be harmless and subject to case-by-case analysis. Petition at 22 (citing *People v. Williams*, 148 P.3d 47 (Cal. 2006) (Bible permissibly counseled deference to governmental authority and affirmed validity of sitting in judgment of fellow human beings); *State v. Kelly*, 502 S.E.2d 99 (S.C. 1998) (mistrial denied when jury had available a pro-death-penalty religious tract during deliberations; prejudice to be determined on case-by-case basis); *Jones v. Francis*, 312 S.E.2d 200 (Ga. 1984) (no prejudice found when trial court permitted jury to bring Bible into deliberations); *State v. Harrington*, 627 S.W.2d 345

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[10] In *McNair*, the Bible was read only to the guilt-innocence jury, so there was no mitigation evidence presented at that time. 416 F.3d at 1309 n.19.

(Tenn. 1981) (death sentence reversed for *Witherspoon*[11] error; in dicta the court comments that foreman buttressing his argument for the death penalty with the Bible during deliberations would have been reversible error)). Lucero also cites *United States v. Lara-Ramirez* to support his argument. Petition at 21 (citing 519 F.3d 76 (1st Cir.-Puerto Rico 2008)). *Lara-Ramirez* presented an entirely dissimilar fact pattern and a completely contrary holding. There, the circuit court was evaluating the propriety of a mistrial ruling, when the trial court did not know whether the Bible was even read. *Id.* at 88-89 (citing *Fields* 503 F.3d at 781-82; *Robinson v. Polk*, 438 F.3d at 366; *McNair*, 416 F.3d at 1308). In comparison, Lucero's trial court had adequate information about the nature and extent of Biblical reference during deliberations upon which to make its decision.

Lucero's "circuit split" is actually variation between fact patterns which does not justify a grant of certiorari in this case. Lucero fails to present authority supporting the proposition that the Bible is an outside influence of the sort that gives rise to a presumption of prejudice. Yet even if it did, the lower court was completely reasonable in finding that presumption rebutted by evidence that there was no prejudice to Lucero.

II. Both Subjective and Objective Evidence in the Record Supports the Lower Court's Finding that Error, if any, was Harmless.

Lucero next contends that jurors' subjective accounts of their deliberations cannot be considered in evaluating prejudice. Petition at 30. Lucero argues that the harm analysis was flawed because the lower court

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[11] *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

based its conclusion on the juror affidavits. *Id.* at 30-31. He also complains that a hearing should have been held to cross-examine the jurors about their affidavits. *Id.* However, the lower court's conclusion was supported by objective data independent of the subjective juror accounts, and its harm analysis was appropriate. The trial error about which Lucero complains was harmless beyond a reasonable doubt and, therefore, does not state a basis for reversal. *Chapman,* 386 U.S. at 23; *see also Delaware v. Van Arsdall,* 475 U.S. 673, 681 (1986) (holding that "an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt"). Additionally, Lucero relies on case law which is taken out of context. The lower court properly applied Texas Rule of Evidence 606(b), which did permit consideration of the jurors' affidavits if the influence was found to be an external one. Therefore, the lower court essentially performed a commonplace hypothetical analysis: the Bible was not an external influence, but if it was, it was harmless. *Lucero v. State,* 246 S.W.3d at 95-97.

The court below conducted two separate inquiries: whether the Bible reading was improper, and if so, harmful, *and* whether the trial court properly denied Lucero's motion for new trial and motion for an evidentiary hearing. The lower court noted that the objective record showed that this brief reading of Biblical scripture, "which was essentially an admonishment to follow man's law (and, therefore, duplicated what was already in the court's charge)," occurred near the beginning of jury deliberations. *Id.* at 95. As the trial court and the court below found, both the content of the quote and the length of time between the reading and the punishment verdict indicate that the scripture had no

effect on the verdict rendered some five hours later.[12] *Id.* "[A]ny constitutional error that [Lucero] may have preserved as a result of this Bible reading was harmless beyond a reasonable doubt." *Id.*

Lucero argues that the juror affidavits are inadmissible under "federal law" and therefore the lower court had no evidence regarding harm. Petition at 30-31, citing *Yates v. Evatt*, 500 U.S. 391, 404-05 (1991), *Smith v. Phillips*, 455 U.S. 209, 216 (1982), and *Rushen v. Spain*, 464 U.S. 114, 121 n.5 (1983). This is a misstatement. *Yates* instead addresses an unconstitutional jury instruction and says nothing about a state court's evidentiary rules regarding admissibility of evidence in this context. *Yates*, 500 U.S. at 404-05. *Smith* specifically encourages the consideration of jurors' subjective mental processes in jury-bias cases. *Smith*, 455 U.S. at 216-17. The note in *Rushen* permits testimony about whether prejudicial outside information was introduced into deliberations, which logically includes evidence about whether the information was prejudicial. *Rushen*, 464 U.S. at 121 n.5. This is essentially what *Tanner* says, too. Even *McNair* relied on juror testimony regarding their subjective reaction to Biblical passages. *McNair*, 416 F.3d at 1309.

Under Texas' scheme, neither Lucero's affidavits nor the State's are admissible *unless* the Bible is found to

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[12] Therefore, this is nothing like *People v. Harlan*, which Lucero cites out of context. 109 P.3d 616 (Colo. 2005); *see* Petition at 22. There, the Biblical quotes commanded the death penalty for murderers, and the Colorado trial court concluded that because of that passage, *not* Romans 13, "there was a reasonable possibility that use of the Bible in the jury room to demonstrate a requirement of the death penalty for the crime of murder would have influenced a typical juror to reject a life sentence for Harlan." 109 P.3d at 619-20. And *Harlan* was decided on state law grounds, *not* the Sixth Amendment.

be an external influence, and then testimony is permitted regarding whether the influence was "improper." Tex. R. Evid. 606(b). Ironically, if Lucero is correct and the Bible was an outside influence, the state statute *mandates* consideration of the jury's affidavits. Those affidavits conclusively demonstrate that the passage had no effect on the verdict. *Lucero*, 246 S.W.3d at 95.

Yet even discounting both sides' affidavits, the lower court's decision is supported by objective facts in the record. First, the content of the quotation speaks for itself. The portion read in deliberations did not introduce a competing set of laws—rather, it stressed that the jurors must obey the civil laws of government. *Id.* Since it is understandably difficult to be a juror in a death-penalty case, the foreman chose that scripture in order to comfort people and reassure them that they should follow the law and instructions of the trial court, and that the Bible encouraged them to do so.[13] *Id.* at 92. The Romans text does not mandate obedience to the prosecutors *per se*, nor did the jury discuss Christian history texts on what Saint Paul meant or intended regarding separation of powers. *See* Petition at 35-36. Nor did the jury foreman connect the dots between Romans and reaching any particular verdict. *Lucero*, 246 S.W.3d at 92.

Second, the record reflects deliberations spanning several hours. One juror said that "[t]he reading of the Bible and the comfort comment probably took less than 2 and 1/2 minutes out of several hours of deliberations

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[13] Texas Rule 606(b) does not prohibit considering juror testimony generally, only that which discusses the effect on the juror's mental processes influencing their verdict. Thus, it is perfectly acceptable to consider the foreman's description of what he read and his rationale for reading it, or another juror's account of how long the reading took and during what portion of deliberations it occurred.

discussing the charged law and the facts." *Id.* The record indicates that jury deliberations began at 12:20 pm and ended at 5:19 pm. The record also indicates that the scripture was read near the beginning of the deliberations, thus the jury deliberated for many hours after the scripture was read and before they rendered a final verdict. *Id.* at 95 n.9.

Thus, even were the lower court not permitted to consider the jurors' affidavits regarding their subjective impressions, it had adequate objective evidence in the record with which to conclude Lucero had failed to prove any harm. The trial court's decision was sound—the factually-irrelevant portion of Scripture read by the foreman could not have affected the verdict because it did not deal with punishment for murderers or indicate which way a juror should vote; at most, it advised the jurors to submit themselves to the authority of the court and its instructions— no more an "extrinsic influence" than the jury charge itself. *See* Petition at 16. Lucero would interpret this Biblical quote as mandating obedience to the prosecutors, not the government in general, and confuses court and legislature with the prosecutors as "the State," but no reasonable juror would, nor did Lucero's jurors do so.[14] Further, the Bible was brought in by a juror. Last, the State offered overwhelming guilt and punishment evidence, while the defense offered a fairly weak mitigation case.

Further, Lucero's motion for new trial and a hearing were denied on other grounds, not the merits of the Constitutional claim. Lucero was only entitled to an evidentiary hearing if his motion for new trial and

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[14] Carried to its logical conclusion, Lucero's argument would preclude instructing juries to obey the law, since the law is being enforced and championed by the law-enforcement officers and the prosecutors.

accompanying affidavits raised matters not determinable from the record, upon which he could be entitled to relief. *Lucero v. State,* 246 S.W.3d at 94 (citing *Wallace v. State,* 106 S.W.3d 103, 108 (Tex.Crim.App.2003)). Neither the trial court nor the lower court had to decide whether the Bible qualified as an external influence because Lucero "present[ed] no 'reasonable grounds' that this Bible reading affected the jury's verdict." *Id.* at 95. Under state law, the trial court's decision is reviewed for an abuse of discretion. *Lucero v. State,* 246 S.W.3d at 94 (citing *Martinez v. State,* 74 S.W.3d 19, 22 (Tex.Crim.App.2002)). Lucero fails to show that the trial court's decision was an abuse of discretion.

Lucero argues, inconsistently, that the lower court was wrong for considering "the jurors' subjective testimony of the Bible's effect on their votes" and at the same time was wrong for not holding an evidentiary hearing *in order to consider the jurors' testimony.* Petition at 30. If the lower court had held that the Bible was an outside influence, Lucero would still have failed to make a reasonable showing that the scripture reading affected the jury's decision, which would be required to summon the jurors for cross-examination. Finding the Bible to be an outside influence would merely confirm the admissibility of the jurors' affidavits under the Texas Rule 606(b) exception for testimony about outside influences, revealing the inconsistent nature of Lucero's position. Lucero puts the cart before the horse. The courts below merely evaluated whether Lucero had made the requisite showing that a hearing was likely to produce useful information in order to merit holding a hearing. Since the trial court concluded that the products of such a hearing would nonetheless be inadmissible, it found Lucero's showing deficient and denied further inquiry behind the verdict. CR 350-51.

CONCLUSION

Because the Texas Court of Criminal Appeals' analysis was correct, no special or important reason for granting certiorari exists. Accordingly, the State respectfully requests that this Court deny Lucero's petition.

Respectfully submitted,

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